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Issue Date: 01 June 2005

OALJ CASE NUMBER: 2005-TLC-00009

ETA CASE NUMBER: R6-05038-24911

In the Matter of:

GLOBAL HORIZONS, INC. (VALLEY FRUIT ORCHARDS),
Complainant,

and

U.S. DEPARTMENT OF LABOR,
Respondent.

DECISION AND ORDER

This case arises under the temporary alien agricultural labor services provisions of the Immigration and Nationality Act, 8 U.S.C. §1101(a) (15) (H) (ii) (a), and its implementing regulations in 20 CFR 655 *et. seq*. For the reasons that follow, I hereby **REVERSE** the Certifying Officer's decision to deny the temporary alien agricultural labor certification of 29 workers.

BACKGROUND

On January 20, 2005, Employer Global Horizons, Inc. on behalf of Valley Fruit Farms ("Employer") filed an Application for Alien Employment Certification ("H-2A Application") under the H-2A program of the Immigration and Nationality Act requesting 90 fruit workers for the period of March 8 to November 1, 2005 at Valley Fruit Orchards, LLC in Wapato, Washington.

On January 31, 2005, the Certifying Officer ("CO") red-flagged six provisions of Employer's H-2A Application which needed modification before approving the application. The

modification relevant to this decision required Employer to remove the provision that United States citizens have a valid social security number ("SSN") prior to starting work whereas alien workers could provide a valid SSN upon commencement of work. Global accepted the modification request on February 3, 2005 and removed this provision that a U.S worker could not start work without a valid SSN. On February 7 2005, the CO accepted Employer's application for consideration and instructed Employer to carry out recruitment efforts of U.S workers. Employer carried out these recruitment efforts for the next couple of months as required by the Employment and Training Division ("ETA") but had not fulfilled its need of 90 workers as of March 16, 2005.[1]

On April 12, 2005, the CO denied Employer's H-2A Application on the basis that there were a sufficient number of able, willing and qualified U.S workers and denied 29 out of 31 H-2A certifications sought by Employer. Employer argues that these 29 positions cannot be filled by the referrals they were given because the applicants had mismatched SSNs. Also, on April 12, 2005, Employer submitted another application ("Subsequent H-2A Application") requesting certification of 250 fruit workers at Valley Fruit Orchards and Green Acre Farm in WA for the period of May 28, 2005 to June 30, 2005.

On April 19, 2005, Employer filed an appeal of the denial of the 29 H-2A certifications at issue in this decision.

On April 20, 2005, the CO also denied certification for the Subsequent H-2A Application stating that the Subsequent H-2A Application is a "replacement application" seeking additional workers to the H-2A Application seeking 90 workers which had previously been denied on April 12, 2005. This is the same argument presented by the Solicitor's Office of the U.S Department of Labor who now claims that the H-2A Application is moot because it is superseded by the

[1] The exhibits provided by Employer demonstrate the following recruitment efforts: Employer followed the advertising requirements set forth by the ETA and confirmed advertisements in a letter dated February 10, 2005. See Exhibit 5. In a letter dated February 18, 2005, Employer then requested that the referrals from the Washington State Workforce Commission ("SWA") cease as they had over "100 referrals" which was more than needed for the 90 positions. See Exhibit 6. Employer accepted 92 referrals and held an orientation for the position on February 21, 2005 in Washington. Twenty-eight referrals came to orientation with Employer and four referrals left during the orientation. See Exhibit 7. This left Employer with 24 U.S. workers, 22 who started working as of March 16, 2005. Employer contacted the SWA and reopened its request for referrals. See Exhibit 8.

Subsequent H-2A Application. Employer denies this and claims that the Subsequent H-2A Application was intended to "replace and perfect" a prior application dated November 24, 2004 for Green Acre and Zirkle Farms ("Green/Zirkle Application") requesting a total of 490 workers which was denied certification on January 3, 2005.

The parties have agreed via a facsimile transmission on May 5, 2005 to waive a hearing in this case, to waive the accelerated time constraints for briefing and issuing a decision under the temporary labor certification regulations, and that this appeal filed by Employer can be decided based on written briefs alone without a trial *de novo*.

Employer submitted its closing brief on May 12, 2005 which incorporated by reference its Request for a De Novo Hearing and Employer Exhibits 1-13 submitted on April 19, 2005. Respondent, the Department of Labor, submitted its Response Brief on May 20, 2005 which contained its exhibits A-E. With no objections to any of these exhibits, they are admitted into evidence in this case. Five Administrative Law Judge Exhibits are marked ALJX 1-5 and are comprised of a May 5, 2005 telefax transmittal and letter addressed to me with a copy to Employer counsel from Respondent counsel (ALJX 1), a May 11, 2005 Affidavit of Jennifer P. Adle containing nine paragraphs over two pages (ALJX 2), Employer's Closing Memorandum filed May 12, 2005 with the incorporated Request for De Novo Hearing filed April 19, 2005 (ALJX 3), Respondent's Response Brief filed May 20, 2005 (ALJX 4), and Employer's Reply Brief filed May 25, 2005 (ALJX 5). ALJXs 1-5 are admitted into evidence with no objections.

DISCUSSION

The legal issues to be determined in this care are twofold: 1) whether the instant H-2A Application has been superseded and replaced by the Subsequent H-2A Application rendering this appeal moot, and 2) whether the Employer has failed to show that it was unable to hire able, willing and qualified US workers when it was unable to hire the 29 applicants with mismatched SSNs.

The Certification At Issue Is Not Moot Due To The Subsequent H-2A Application

The first issue is not determinative of the outcome in this decision and will be discussed briefly. Employer is claiming in its final brief that the Subsequent H-2A Application "replaces and perfects" the Green/Zirkle Application dated November 24, 2004 which was denied on January 3, 2005. ALJX 5 at 4. However, a comparison of the letter by the CO denying the Green/Zirkle Application provided by Employer and the Subsequent H-2A Application from April 12, 2005 are not consistent on the face of the documents. The Green/Zirkle Application requests 490 H-2A certifications for the period of January 10, 2005 to November 15, 2005 for Green Acre and Zirkle Farms. The Subsequent H-2A Application filed on April 12, 2005 requests 250 H-2A certifications for the period of May 28, 2005 to June 30, 2005 for Valley Fruit and Green Acre Farms. A review of the record raises the question as to why Employer waited until April 12, 2005 to "replace and perfect" a denial dating back to January 3, 2005. In its cover letter for the Subsequent H-2A Application, Employer notes that the application "replaces and perfects the applications for which you *recently* denied certification." Without further reference to the denied application's date or case number, it is not possible to precisely ascertain Employer's intent in this case. [2] I also reject the Solicitor's argument that the Subsequent H-2A Application was intended to replace the instant H-2A Application which was denied on April 12, 2005. Although the timing of the denial of the H-2A Application and the filing of the Subsequent H-2A Application on the same day is suggestive that one was intended to replace the other, it is not conclusive.

Since the denial of the Subsequent H-2A Application is also under appeal under a different case number and is not at issue in this decision, I will treat the Subsequent H-2A Application as an independent application and not one which is meant to "replace and perfect" either the instant H-2A Application. The filing of the Subsequent H-2A Application does not render the appeal of the instant H-2A Application moot since the Solicitor's Office has not provided me with any legal authority as to that effect. Employer, as the prevailing party in this

[2] It is critical to note here that Employer must reference the case number on all written correspondences to the CO, DOL and all interested parties to avoid any delays in processing of applications. This requirement is also highlighted in the CO's denial letter of January 3, 2005 under the Notice of Appeal Rights under 20 CFR 655.104(c), which gives an employer seven days upon denial of a H-2A labor certification to request an expedited administrative judicial review or a de novo hearing by a DOL Administrative Law Judge.

case, is judicially estopped, however, in any other cases before this Office involving the Subsequent H-2A Application including OALJ Case No. 2005-TLC-00011, from arguing anything contrary to its statement that Employer is claiming in its final brief that the Subsequent H-2A Application "replaces and perfects" the Green/Zirkle Application, an application previously denied certification. See ALJX 5 at 4.

Employer Has Met The Requirements Under 8 U.S.C § 1188 And C.F.R 655.100(a)(4)(ii) For H-2A Certification Under The Facts Of This Case

In regards to the second issue, I will now consider the denied certification for the 29 H-2A workers. An employer must meet the following requirements in order to be granted certification for temporary alien agricultural workers under the Immigration and Nationality Act's ("INA") H-2A program:

(a) there are not sufficient workers who are able, willing and qualified, and who will be available at the time and place needed, to perform the labor or services addressed in the petition, and
(b) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C § 1188; C.F.R 655.100(a (4)(ii). Once the CO accepts the application for consideration, an employer is required to carry out the assurances contained in 20 C.F.R 655.103(d) to engage in positive recruitment of U.S workers. Upon acceptance of consideration, Employer in this event has carried out the required procedures under this regulation to recruit U.S workers by placing advertisements and working with the SWA to recruit U.S workers.

The burden of proof in the labor certification process is on the Employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsh Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. 656.2(b). As was noted by the Board of Alien Labor Certification Appeals (Board) in *Carlos Uy III*, 1997-INA-304 (Mar 3, 1999)(*en banc),* "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case.

Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Id.* at 8. The Employer has the burden of satisfactorily responding to or rebutting all findings in the NOF. *Belha Corp.,* 1988-INA-24 (May 5, 1989) (*en banc*). Where the CO requests documents or information with a direct bearing on the resolution of an issue and which is obtainable by reasonable effort, the employer must provide it. *Gencorp,* 1987-INA-659 (January 13, 1988) (*en banc*).

The issue that remains now is whether Employer failed to hire qualified U.S workers by denying or terminating those 29 applicants with mismatched SSNs. C.F.R 655.103(c) requires that "no U.S worker will be rejected for or terminated from employment for other than a lawful job-related reason, and notification of all rejections or terminations shall be made to the local office." In addition, C.F.R. 655.102(a) prohibits the preferential treatment of aliens and states the following:

> (a) the employer's job offer to U.S workers shall offer the U.S workers no less than the same benefits, wages, and working conditions which the employer is offering, intends to offer, or will provide to H-2A workers. Conversely, no job offer may impose on U.S workers any restrictions or obligations which will not be imposed on the employer's H-2A workers.

The Solicitor argues that the 29 applicants should have been given the opportunity to start work while they were addressing the SSN mismatches. The Solicitor questions whether there was a firm hiring commitment made to these applicants since there was no mention of a start date on the SSN mismatch letters sent to the applicants. The Solicitor then argues that even if there was a hiring commitment made, the letters had a "chilling effect" on the applicants and would have deterred "reasonable people" from appearing on the job, which was evident when all 29 applicants failed to show up on March 8, 2005, the start date. The second argument proposed by the Solicitor is that Employer did not give these applicants enough time to resolve the SSN mismatches. By giving the applicants a 30-day period upon receipt of the letter to fix the SSN mismatches while H-2A workers are able to apply for and receive a SSN upon commencement of work, the Solicitor claims that Employer failed to treat the two groups equally.

Employer argues that they made verbal hiring commitments to the 29 applicants, and then verified the individual's SSN through the Social Security Administration's ("SSA") Employee Verification System ("EVS") to determine if the applicant's SSN and name matched the SSA's records. ALJX 2, *Affidavit of Jennifer P. Adle* dated May 11, 2005, at p. 2. Employer then sent out SSN mismatch letters to these 29 applicants at issue between the dates of February 17, 2005 to March 29, 2005. *Id*.

Employer also argues that the 30-day period granted in the SSN mismatch letters is an acceptable procedure under the INA's H-2A program, and that forcing Employer to hire workers with SSN mismatches "undermines Employer's attempts to assure a legal workforce and potentially violates federal law." Employer maintains that knowingly employing illegal aliens not authorized to work in the U.S could also subject them to fines under the Immigration Reform and Control Act of 1986 ("IRCA") and by the Internal Revenue Service ("IRS"), as well as dissipate their workforce if these applicants had to be terminated due to their illegal status.

Based on the aforementioned arguments, I will consider whether Employer unlawfully denied or terminated the 29 applicants based on their SSN mismatches in violation of 20 C.F.R 655.103(c), and whether the H-2A applicants were given preferential treatment under C.F.R 655.102(a). There are two objectives to keep in mind here. One is the constructional preference given under these regulations that they be "construed to effectuate the purpose of the INA that U.S workers rather than aliens be employed whenever possible." 20 C.F.R 655 citing Elton Orchards, Inc v. Brennan, 508 F.2d 493, 500 (1st. Cir. 1974); Flecha v. Quiros, 567 F.2d 1154, 1156 (1st Cir. 1977). However, it is also necessary that employers only hire or retain "eligible employees" under the H-2A program which means "an individual who is not an unauthorized alien." 8 U.S.C § 1188(i). While the SSA makes it clear that a SSN mismatch "makes no statement about an employee's immigration status," [3] an employer also has to be aware that it will be subject to fines by the IRS for submitting incorrect or false SSNs if it fails to take corrective measures upon receiving a mismatch letter by the IRS. 26 U.S.C §6721.

[3] See Social Security Administration's website, www.ssa.gov/employer.critical.htm.

In this instance, I find that there was a hiring commitment made by Employer to the 29 applicants since both parties had agreed to stipulate as such in their Proposed Stipulated Facts.[4] Upon discovering SSN mismatches through EVS, Employer was reasonable in sending out the SSN mismatch letters to these applicants and giving them a 30-day period to resolve the problem.

Employer, however, was required to allow these applicants to commence work even if they needed additional time to resolve the SSN mismatch. This requirement was clearly stated by the CO's request for modification asking Employer to remove the requirement in its H-2A Application that U.S workers had to have valid SSNs prior to commencement of work. Employer accepted this modification on February 3, 2005. Here, the 29 applicants neither fixed their SSN mismatches or showed up for work on March 8, 2005. Therefore, Employer was unable to have them start work or give them any additional time to resolve the SSN mismatches as the Solicitor proposes. Since a verbal hiring commitment was made to the 29 applicants, followed by a SSN mismatch letter, I do not find that these letters had a "chilling effect" upon these applicants from appearing for work on the first day. In fact, the record shows that there was one worker, Jesus Magana, who commenced work without a SSN verification but was terminated shortly thereafter because he failed to provide SSN verification.[5] The SSN mismatch letters request that the recipients contact the SSA and obtain a letter from the SSA stating that the SSN is valid and belongs to the individual. The letter states that Employer must receive a letter from the SSA confirming a valid SSN within 30 days of receipt of the letter or the individual "can be terminated due to being unable to verify employment eligibility." To date, there is no uniform regulation stating that an employer has to give employees a stated period of time to correct SSN mismatches. I therefore find that this 30-day period was reasonable by the Employer and reject the Solicitor's argument that this was not enough time to correct the SSN mismatches.

[4] There is an inconsistency between the parties' Proposed Stipulated Facts and in the Solicitor's brief postdating the Stipulated Facts disputing whether there were hiring commitments made by Employer. In addition, the Solicitor comments that "whether Global made such hiring commitments is irrelevant in this matter" in a facsimile dated May 5, 2005. See ALJX 1 at 2.

[5] There is no indication in the record that this worker was given a SSN mismatch letter prior to starting work on March 18, 2005. He was terminated on March 21, 2005 because he could not provide SSN verification.

In conclusion, I find that Employer has met the requirements under 8 U.S.C § 1188 and C.F.R 655.100(a)(4)(ii) for H-2A certification because Employer has shown that it was unable to find "sufficient workers who are able, willing and qualified" when the 29 applicants did not show up for work on March 8, 2005, and because certifying 29 temporary H-2A workers out of a total of 90 workers "will not adversely affect the wages and working conditions of workers in the United States similarly employed." I further find that Employer did not unlawfully deny or terminate the 29 applicants or give the H-2A applicants preferential treatment in violation of 20 C.F.R 655.103(c) and under 20 C.F.R 655.102(a) by conducting SSN verifications of the 29 applicants prior to commencement of work, as long as Employer would give these applicants a reasonable amount of time to resolve the SSN mismatches either prior to or upon commencement of work.

ORDER

The denial of the 29 H-2A certifications by the Certifying Officer is hereby **REVERSED** and the Certifying Officer is hereby **ORDERED** to process the application in accordance with the regulations and this decision.

A

Gerald M. Etchingham
Administrative Law Judge

San Francisco, California